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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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NEW JERSEY COURT OF ERRORS AND APPEALS

ARCH R. EVERSON,
Prosecutor-Respondent,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Respondents-Appellants

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court rests upon the statutory provision contained in United States Code Annotated, Title 28, Section 344, Paragraph (a), which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of the United States Supreme Court.

The date of the judgment of the New Jersey Court of Errors and Appeals sought to be reviewed is November 8, 1945.

Petition for re-argument was denied on November 29, 1945.

The application for the allowance of an appeal was presented to the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on February 5, 1946, and was duly allowed on that date. The application and allowance were, therefore, timely.

Statement of the Case

The judgment referred to above upheld the constitutionality of the resolution of the Appellee Board of Education and the Act of the Legislature of the State of New Jersey, hereinafter quoted, which resolution and statute had been duly attacked in the pleadings as being an infringement of the 14th Amendment of the Constitution of the United States and of appellant's rights thereunder. (State of case, N. J. Court of Errors and Appeals, page 15.)

On application of the appellant, a resident and taxpayer of the Township of Ewing, the New Jersey Supreme Court issued a writ of certiorari to review the legality of a resolution adopted on September 21, 1942, which resolution provided:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

The statute in question is Chapter 191, Laws of 1941 of the State of New Jersey entitled "An Act relating to educa-

tion, and amending Section 18:14-8 of the Revised Statutes," which reads as follows:

"1. Section 18:14-8, of the Revised Statutes is amended to read as follows:

"18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part. (Italics ours.)

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one."

The 1941 amendment (Chapter 191, Laws of 1942) changed the words "the schoolhouse" in the first paragraph of R. S. 18:14-8 to read "any schoolhouse", and the other parts of the statute italicized above were added by said amendment.

Pursuant to the said resolution the Appellee Board of Education agreed to pay for the then current school year

the cost of transportation to such catholic parochial schools approximately $859.80, and on February 15, 1943 authorized the payment of $8,034.95 for transportation, of which $357.74 was paid to the parents of pupils who were transported to such parochial schools.

All of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curricula in each of said schools. A priest of the Catholic Church is the Superintendent of said schools.

In the New Jersey Supreme Court appellant contended that the resolution and statute violated certain provisions of the State Constitution and the 14th Amendment of the Constitution of the United States.

The New Jersey Supreme Court held (132 N. J. L. 98, 39 A. 2d 75) that the resolution and statute violated certain provisions of the Constitution of New Jersey and entered judgment for this appellant setting aside the resolution.

The New Jersey Court of Errors and Appeals (133 N. J. L. 350, 44 A. 2d 333) pointed out in its opinion that the record before it showed that the reasons advanced in the New Jersey Supreme Court and in the New Jersey Court of Errors and Appeals "in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely, Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State, N. J. S. A.; and the Fourteenth Amendment to the Constitution of the United States", but held "that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to any school", and entered judgment reversing the judgment of the New Jersey Supreme Court.

Thus, there is presented a suit wherein is drawn in question the validity of a statute of the State of New Jersey and

validity of a resolution of the Appellee Board of Education on the ground of their being repugnant to the Constitution of the United States in which the decision of the highest court of that state was in favor of the validity of the statute and resolution.

Wherefore, it is submitted that the United States Supreme Court has jurisdiction to review the judgment appealed from.

Points and Authorities

1

Appeal is the remedy for review of a decision of a State Court of last resort in favor of the validity of a state law, where the state law is alleged to infringe the Federal Constitution.

Western Turf Ass'n vs. *Greenberg*, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520;

Great Northern Ry. Co. vs. *State of Minnesota*, 278 U. S. 503;

Nashville and St. L. Ry. vs. *White*, 278 U. S. 456.

2

The validity of a statute which can only be fulfilled by resort to taxation depends on the power of the state to levy the tax for the purpose for which the tax fund is to be used.

Parkersburg v. *Brown*, 106 U. S. 487, 501:

"Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise) is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. *LaGrange*, 113 U. S. 1, 6:

"The general grant of legislative power in the Constitution of a State (Missouri) does not enable the

Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

3

The action of a state in leving taxes for a private, as distinguished from a public purpose, raises a constitutional question under the 14th Amendment to the Constitution of the United States.

Fall Brook Irrigation District v. *Bradley*, 164 U. S. 112, 158:

"In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government."

4

That statutes authorizing aid to private schools by taxation authorize a levy of taxes for a private, as distinguished

from a public purpose, is a principle established and approved by the decisions of the United States Supreme Court. *Savings and Loan Asso.* v. *Topeka*, 20 Wall. 655:

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. . . .

. . . . . .

"The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover, 103 Mass. 94, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided in the case of *Curtis* v. *Whipple*, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac*, already cited, the principle is fully considered and reaffirmed.

"The cases are clearly in point, and they assert a principle which meets our cordial approval."

The principles decided in that case have never been denied in the United States Supreme Court, but on the contrary they have frequently been cited with approval. *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233.

5

The furnishing of transportation by the state to children attending private or sectarian schools is essentially, and as a practical matter, an aid to such schools.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576:

> "Free transportation induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. • • • It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

State ex rel. Traub v. *Brown*, 36 Delaware 181, 172 A. 835, writ of error dismissed, 197 A. 478:

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations."

Gurney v. *Ferguson*, 190 Okl. 254, 122 P. 2d 1002, *certiorari* denied, 317 U. S. 588, rehearing denied, 317 U. S. 707:

> "It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. • • • It is true this use of public money and property aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.

"If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. If the maintenance and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school."

Mitchell v. *Consolidated School Dist. No. 201* (Supreme Court of the State of Washington), 135 P. 2d 79:

"We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid, of the school. Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system. . . .

. . . . . .

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself."

Sherrard v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. 2d 963.

State ex rel. Van Straten v. *Milquet*, 180 Wis. 109, 192 N. W. 392.

The state should not be permitted to do indirectly what it cannot do directly.

The courts of this country have been unanimous in prohibiting a use of public funds to pay, *directly or indirectly*, tuition fees of pupils in private or sectarian schools.

Williams v. *Board of Trustees, Stanton Common School Dist.*, 173 Kentucky 708, 191 S. W. 507, reversing on rehearing, 172 Kentucky 133, 188 S. W. 1058, and discarded.

Otken v. *Lamkin*, 56 Miss. 758.

Synod of Dakota v. *State*, 2 S. D. 366, 50 N. W. 632.

In re Opinion of the Justices, 214 Mass. 599, 102 N. E. 464.

People ex rel. Roman Catholic Orphan Asylum Society in City of Brooklyn v. *Board of Education*, 13 Barb. 400.

If the judgment of the court below is not reversed, it will be within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools, by paying to the parents the amount of such costs. The state will be permitted to do indirectly what it cannot do directly.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576:

> "Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, *to whomsoever made*, circuitiously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interest and purposes."

7

If the furnishing of transportation to children attending private and sectarian schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the federal constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and

without any special obligation of the state, charitable or otherwise, to such persons.

Savings and Loan Asso. v. *Topeka,* 20 Wall. 655:

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been enunciated in state courts, and applied to use of public funds to aid those attending private schools.

State v. *Switzler,* 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280:

> "The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *
>
> "It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers'."

8

If the furnishing of transportation to children attending private and sectarian schools is not to be considered an aid to such schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the federal constitution because it constitutes a taking of private property to aid private individuals for

a purpose which is not effectuated by or through a public agency.

People v. *Westchester County National Bank*, 231 N. Y. 465, 132 N. E. 241, 244:

> "Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state's credit. Such a purpose may not be served in one particular way. However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of the credit to an individual or a corporation. It will not do to say that the character of the act is to be judged by its main object—that because the purpose is public, the means adopted cannot be called a gift or a loan."

Prior to the judgment of the court below, the same principle was recognized and was applied by the courts of New Jersey to statutes in aid of education.

Wilentz v. *Hendrickson*, 133 N. J. E. 447, 480, affirmed 135 N. J. E. 244:

> "These constitutional amendments were, however, directed at the means of effectuating that public purpose. The were intended to prevent the accomplishment of that purpose by the means of aid to private corporations not constituting public agencies controlled by the state."

In re Voorhees, 123 N. J. E. 142, 147, affirmed 121 N. J. L. 594, affirmed 124 N. J. L. 35:

> "And in *Trustees of Newark Free Public Library* v. *Civil Service Commission*, 83 N. J. Law 196, 83 Atl. Rep. 980; aff'd 86 N. J. Law 307, 90 Atl. Rep. 261, the constitutional validity of the appropriation of public moneys by municipalities to free public libraries is rested on the ground that the libraries in question were public agencies for public education and the appropriations are expenditures by the state or muni-

cipality for such public education *through* such agents." (Italics by court.)

Rutgers College v. *Morgan*, 70 N. J. L. 460, 473, affirmed 71 N. J. L. 663:

> "This provision, as well as that relating to special laws, does not bar instrumentalities for public education *provided by the state and under its control* by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for *public* education *under its own supervision.*" (Italics ours.)

A statute authorizing transportation of children to private and sectarian schools is not in aid of an agency or instrumentality of the state for public education provided by the state and under its control and supervision.

9

A statute which does not provide for transportation of pupils generally but only of pupils attending public schools and non-profit private schools constitutes a taking of private property for a private purpose in so far as the transportation of pupils attending non-profit private schools is concerned.

10

A resolution which authorizes transportation of children to Catholic schools, and makes no provision for transportation of children attending sectarian schools other than Catholic schools, segregates the schools and the pupils designated as beneficiaries and constitutes a taking of private property for a private purpose.

11

That a statute respecting an establishment of religion or authorizing the support of any religious tenets by taxation is prohibited by the federal constitution is a principle established and approved by the decisions of the United States Supreme Court.

Reynolds v. *United States*, 98 U. S. 145:

> "Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion and sometimes for the support of particular sects to whose tenets they could not and did not subscribe."

Davis v. *Benson*, 133 U. S. 333:

> "The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of a religion, or forbidding the free exercise thereof, was intended * * * to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."

12

The Fourteenth Amendment makes applicable to the states and their subdivisions the guaranties of religious liberty contained in the First Amendment.

Murdock v. *Pennsylvania*, 119 U. S. 105, 108:

> "The First Amendment, which the Fourteenth Amendment makes applicable to the States, declares that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

A statute or resolution authorizing the use of tax moneys for the purpose of furnishing transportation to children attending sectarian schools is legislation respecting an establishment of religion.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 581, 582, a case holding such a statute unconstitutional:

> "While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. • • • Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law."

Gurney v. *Ferguson*, 190 Okl. 254, 122 P. 2d 1002, certiorari denied, 317 U. S. 588, rehearing denied, 317 U. S. 707, another case in which a state court held such a statute unconstitutional:

> "In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete

control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution."

Harfst v. *Hoegen* (Missouri Supreme Court), 163 S. W. 2d 609:

"The constitutional policy of our State has decreed the absolute separation of church and State, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this case, religion is taught in the schools and a priest of the church is the superintendent of the schools.

14

A statute or resolution authorizing the use of tax moneys for the purpose of furnishing transportation to children attending sectarian schools is legislation for the support of religious tenets.

Judd v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 581.

Gurney v. *Ferguson*, 190 Okl. 254, 122 P. 2d 1002, certiorari denied, 317 U. S. 588, rehearing denied, 317 U. S. 707.

Harfst v. *Hoegen* (Missouri Supreme Court), 163 S. W. 2d 609.

Dakota Synod v. *State*, 2 S. D. 366, 50 N. W. 632.
Williams v. *Stanton Common School District*, 173 Ky. 708, 191 S. W. 507.

15

The resolution of the Appellee Board of Education is legislation respecting an establishment of religion and for the support of religious tenets in that it contains no provision for the transportation of children to sectarian schools generally, but segregates the schools and the pupils designated as beneficiaries, and makes no provision for transportation of children attending sectarian school other than Catholic schools.

Respectfully submitted,

ALBERT MCCAY,
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CHALLEN B. ELLIS,
Of Counsel.

APPENDIX "A"

NEW JERSEY COURT OF ERRORS AND APPEALS,
MAY TERM, 1945

No. 32

ARCH R. EVERSON, *Prosecutor-Respondent,*

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the COUNTY OF MERCER, et als., *Respondents-Appellants*

Appeal from the Supreme Court on Certiorari

Argued May 21, 1945; decided October 15, 1945.

Syllabus

P. L. 1941, Chapter 191 held to be a valid enactment and not in contravention of Article 1, paragraphs 3, 4, 19 and 20, or Article 4, Section 7, paragraph 6 of the Constitution of this State or the Fourteenth Amendment to the Constitution of the United States.

For respondents-appellants, William H. Speer, of counsel; William Abbotts, attorney of record; George G. Tennant and Joseph Lanigan, amici curiae.

For prosecutor-respondent, Albert McCay, of counsel; Powell and Parker, attorneys of record; Joseph Beck Tyler, attorney and of counsel with American Civil Liberties Union, amicus curiae.

The Opinion of the Court was delivered by the CHANCELLOR:

This is an appeal from a judgment of the Supreme Court, on certiorari, setting aside a resolution of the appellant Board of Education enacted under the authority of R. S. 18:14-8 as amended by P. L. 1941, Chapter 191 providing for the transportation of pupils for the school year, July 1, 1942 to June 30, 1943.

Pursuant to such resolution the appellant on February 15, 1943 authorized the payment of $8,034.95 for transporta-

tion. Of this sum $357.74 was paid to the parents of twenty-one pupils who were transported to parochial schools in Trenton, five to elementary schools and sixteen to high schools. The appellant provides no education facilities in its district beyond the eighth grade. The transportation was by public carrier bus. The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.

The record before us shows that the reasons advanced in the Supreme Court and here in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely: Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State; and, the Fourteenth Amendment to the Constitution of the United States.

None of these several provisions of the Constitution, except that of Article IV, Section 7, paragraph 6, requires any discussion. For neither their language, meaning, intent, nor effect are violated by the statute, supra, or the resolution challenged in this proceeding.

We turn at once to the reason that the statutory enactment is constitutionally defective because it is said that it is in conflict with Article IV, Section 7, paragraph 6.

It appears from the majority opinion of the Supreme Court that it based its conclusion and judgment "on the foundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution" citing as authority Rutgers College vs. Morgan, 70 N. J. L. 460 affd. 71 N. J. L. 663 and In re Voorhees, 123 N. J. Eq. 142 affd. 121 N. J. L. 594 (Supreme Court) affd. here, 124 N. J. L. 35. We find in the minority opinion the statement "There is no proof whatever that any part of the State School Fund was so used here". A meticulous examination of the record shows an absolute lack of any such proof.

The duty of this court in such a situation is well established. It is settled that findings of fact by the Supreme

Court on conflicting evidence or on uncontroverted evidence reasonably susceptible of different inferences are conclusive on appeal, Jersey City vs. State Water Policy Commission, 118 N. J. L. 72, 77; Siravo vs. Sirian Lamp Co., 124 N. J. L. 433. It is also settled that we do not hesitate to reverse where there is no competent evidence to support a fact conclusion arrived at below, Ciocca vs. National Sugar Refining Co., 124 N. J. L. 329, 335; Cirillo vs. United Engineers, etc., 121 Id. 511, 512; Grant vs. Metropolitan Ice Co., 108 Id. 536, 537 and further that this Court will reverse any material fact conclusion if it rests on erroneous premises. Bollinger vs. Wagaraw Building Supply Co., 122 N. J. L. 512, 517; Ciocca vs. National Sugar Refining Co., supra, 335; Rotino vs. J. P. Scanlon, Inc. 126 Id. 419, 421.

As said, the record before us is barren of any evidence as to the source of the funds from which the challenged payment of $357.74 was made.

In this state of proof we must assume that the payment was made lawfully, from funds under appellant's control. We may not assume, in the absence of proof, that the moneys were taken from the appellant Board's distributive share of the income of the State School Fund, R. S. 18:10-1 to 17.

The history of the State School Fund—"The Fund for the support of free schools"—may be traced from its origin in P. L. 1817, pam. 26 as amended by P. L. 1818, pam 100 and succeeding statutory amendments and supplements. Pennington's Revision (1821) p. 612, 649, 660; Nixons Digest (4th Ed. 1868) p. 877, sec. 65-75; Revision (1877) p. 1081, sec. 65-76 and p. 1087, sec. 101, 102; 3 Gen. Stat. 3030, sec. 65-76; 4 Comp. Stat. 4778, sec. 166-176; R. S. 18:10-1 to 17. Therein is perceived the bases and reason for the constitutional provision relied on by the Supreme Court which was originally inserted in the basic law in 1844.

This constitutional provision of 1844 stripped the legislature of the power it had reserved to itself in P. L. 1818, pam. 100, to change, alter or dissolve this trust fund. The capital of the fund and the income therefrom were protected against trespass by the legislature. State vs. Rutherford, 98 N. J. L. 465, 467. The constitutional provision together with other statutes identifies the fund therein referred to.

The amendment of this paragraph of the Constitution in 1875 had an entirely different purpose than the provision just discussed. The amendment of 1875 was a mandate to the legislature to broaden the field of free public school education and pursuant to this mandate legislation was enacted to pay the cost of such education by providing for the raising of a state school tax, delegating taxing powers to local school districts to raise funds for local school purposes and dedicating certain railroad taxes and other state funds for the same purpose. These were all statutory provisions and were subject to alteration, modification, and repeal by subsequent legislation untrammeled by the constitutional inhibition applicable to the fund for the support of free schools. The legislature already had the necessary power and the amendment of 1875 neither increased nor limited it in any particular.

Nothing appears on the face of the resolution or the challenged statute that could be construed to authorize the use by the appellant of any of its apportioned share of the income of the fund for the support of free schools, R. S. 18: 10-1 to 17, to pay the cost of transportation of pupils to parochial schools.

We are asked to imply that the statute and resolution authorize the use of constitutionally prescribed funds for such purpose.

This we may not do. The rule is that courts will presume in favor of the constitutionality of a statute and will incline to a construction favoring its validity unless its invalidity plainly appears. State vs. Tachin, 92 N. J. L. 269, 274 affd. 93 Id. 485; State Board of Milk Control vs. Newark, 118 N. J. Eq. 504, 519; State vs. Murzda, 116 N. J. L. 219, 223.

We are likewise urged to construe R. S. 18: 10-41 as indicating an unconstitutional use of money by the appellant. This section requires the county superintendent of schools to apportion the State School moneys allotted to the county to the respective school districts for certain purposes designated therein.

Let it be noted here that all funds included in the phrase "state school moneys" are not within the constitutional inhibition relied on by the respondent. The section, how-

ever, requires the County Superintendent to apportion out of State School moneys "Seventy-five per cent of the cost of transportation of pupils to *public school or schools* * * *."

The language is clear and unambiguous.

In the case before us the total transportation cost was $8,034.95 for a half year which included $357.74 as the cost of transporting parochial school pupils and in the absence of proof to the contrary we must assume that the County Superintendent obeyed the statute and based the allotment on the cost of transporting the pupils to the public school or schools.

School districts, such as the appellant, are authorized by R. S. 18: 7-78 to raise by special district taxes funds to defray certain current charges and expenses of the public schools in their districts including "transportation of pupils * * *" and "the incidental expenses of the schools."

Funds so raised are not proscribed or limited in their use by Article IV, Section 7, paragraph 6 of the Constitution.

The intent of P. L. 1941, Chapter 191 is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route.* Payment of such expense out of local taxes is the payment of "incidental expenses" or "transportation of pupils" authorized by R. S. 18: 7-78.

Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to any school, we conclude that such authorization of the use of local funds is likewise authorized by P. L. 1941, Chapter 191, and R. S. 18: 7-78. The legislature clearly intended once the transportation of such pupils was contracted for, that it should be paid out of funds constitutionally available for the purpose.

It is next urged the R. S. 18: 14-8 as amended by P. L. 1941, Chapter 191, is violative of *Artice* I, paragraphs 19 and 20 because the payment of transportation costs of

pupils attending schools is the giving of direct or indirect aid to sectarian schools or amounts to a gift to an individual.

Compulsory education has long been a requirement in this State. P. L. 1874, Chapter 522; p. 135; P. L. 1875, Chapter 443, p. 105; P. L. 1885, Chapter 217, p. 280; 3 Gen. Stat. p. 3061, Sec. 255; 4 Comp. Stat. p. 4775, Sec. 153, et seq.; R. S. 18: 14-14 as amended P. L. 1940, Chapter 153, P. 346; R. S. 18: 14-34, 39, 40.

It is a matter of public concern and legislative regulation and should be enforced as long as the requirements are reasonable. Of course this is subject to constitutional limitations, Pierce vs. Society of Sisters, etc. 268 U. S. 510; 45 S. Ct. 571, 69 L. ed. 1070.

It is a public matter within the legislative prerogative concerning which the legislature may act and has, by the statutes including that here considered.

The compulsory education statutes impose on the *parents*, not the children, an absolute duty subject to three exceptions, physical or mental disability of the child or adequate provision by private teaching other than in a recognized day school. The statute is penal in nature for a violation of which parents may be convicted as disorderly persons, R. S. 18: 14-34, 39, 40.

Many situations could arise, where, without regular means of transportation, parents would be placed in a situation which made it practically impossible to comply with the compulsory education requirements and therefore without wilful intent to evade or transgress, would become subject to the penalties established for failure to perform the duty imposed.

It was to meet this mischief that the original statute authorizing the transportation of pupils living remote from the schools was enacted. The statutes looking to transportation became complementary to and in aid of the compulsory education statutes.

It is a public matter and moneys expended therefore, except those prohibited by the Constitution of this State, do not constitute the expenditure of public moneys for private purposes.

We conclude that there is nothing on the face of the resolution or statute or in the record before us showing

that either the statute or the resolution enacted thereunder is unconstitutional or does violence to the Constitution for any of the reasons urged.

The judgment of the Supreme Court is reversed and the cause remanded to the end that the writ of certiorari be dismissed.

Endorsed: "Filed October 15, 1945, J. A. Brophy, Clerk."

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 32, May Term, 1945

Arch R. Everson, *Prosecutor-Respondent*,

vs.

Board of Education of the Township of Ewing, in the County of Mercer, et als., *Respondents-Appellants*

Case, J. (Dissenting):

The issue is the constitutionality of reimbursement by the Board of Education of the Township of Ewing, from public moneys, to parents, resident in the township, for the bus fares paid by their children on public buses between the township and the City of Trenton, in which city the children attended certain Roman Catholic parochial schools. The religion of the church was taught in each of the schools as a part of the curriculum. A priest of the church was the superintendent of the schools. The resolution under review made no provision for transportation to private or sectarian schools other than Catholic schools and therefore did not make provision for children generally. Further, it made no change in the method of transportation and so added nothing to protection against traffic hazards. The transportation had been and continued to be by public buses running on their usual schedules. The township public schools extend through the eighth grade. Public school children beyond those elementary grades are transported either to Trenton or Pennington. Some of the parochial school children transported to Trenton were in the elementary

grades and some in the high school grades. Consequently the parochial school children in the elementary grades were transported to the City of Trenton although the public school children in those grades were received and taught in the schools within the school district. It must be assumed that these various arrangements were within the purview of the statute; else the resolution of the Board of Education was itself without statutory authority and therefore void. The resolution was as follows:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

The resolution is rested upon the second paragraph of R. S. 18:14-8 as amended by ch. 191, P. L. 1941:

> "18:14-8. Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

A major question is whether the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools

is based upon what is known as the "child-benefit" theory which presents as a distinction that the charges are for the benefit of the children rather than of the schools. That theory seems to have first been given judicial sanction in the State of Louisiana where the courts sustained a statute which permitted the use of public funds to purchase school books for distribution, free of cost, apparently as a loan, to "the school children of the state", a classification which by its broad terms included children in attendance at private and parochial schools. *Borden vs. Louisiana State Board of Education*, 168 La. 1005, 67 A. L. R. 1183, *Cochran vs. Louisiana State Board of Education*, 168 La. 1030. The latter case went to the United States Supreme Court (281 U. S. 370, 74 L. Ed. 913) where it was held that the legislation was not in violation of the 14th amendment to the United States constitution. Chief Justice Hughes, holding the opinion for the court (April 28, 1930), after quoting at length from the opinion of the Louisiana Supreme Court to the effect that the appropriations were "for their (viz., the children's) benefit and the resulting benefit to the state", said (italics inserted):—

> "*Viewing the statute as having the effect thus attributed to it*, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation *does not segregate private schools or their pupils*, as its beneficiaries • • •."

I am unable to find more in the federal decision than that, first, the Supreme Court accepted the finding of the state court upon the purpose and effect of the state statute and, second, that the statute, given the purpose and effect thus attributed to it, with the added incident that it did not segregate its beneficiaries, was not in violation of the 14th amendment. That the Supreme Court accepts the construction by a state court of a state statute in such a case is manifested by the fact that some years later it twice (317 U. S. 588, 63 Sup. Ct. 34, 87 Law. Ed. 481; 317 U. S. 707, 63 Sup. Ct. 153, 87 Law. Ed. 564) refused *certiorari* to review the decision of the Oklahoma Supreme Court coming to an opposite conclusion regarding "child-benefit" in *Gurney vs. Ferguson, infra.*

The "child benefit" theory seems to have received judicial support in only three jurisdictions, Louisiana (already discussed), Mississippi (*Chance vs. Mississippi State Textbook R. & P. Board,* 200 Southern 706), which followed the Louisiana reasoning in the construction of a statute of like import, and Maryland; and the last mentioned is the only jurisdiction, so far as appears, where the paying from public funds of transportation costs for children in private or sectarian schools has been judicially approved. In both Louisiana and Mississippi the subject matter was the free distribution of certain textbooks, and the provision was for the benefit of the children of the state, generally. In the State of Maryland it was held that a statute providing for transportation of children to private or parochial schools in the regular public school buses was constitutional, *Board of Education of Baltimore County vs. Wheat*—May 20, 1938—199 Atl. 628, and, several years later, that contributions from public money to the parochial schools for transportation in their own buses was likewise constitutional, *Adams vs. County Commissioners of St. Mary's County*—May 26, 1942—26 Atl. 2d 377. The trend from the one to the other of these two cases toward enlargement of the powers is to be observed.

The "child-benefit" argument is made here. Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. Counsel for the appellants herein say of the theory that its

> "denomination, because of its generality, may be misleading, and we call it so here purely for identificatory purposes. It connotes so much more than merely the benefit to the child and has been so often and so authoritatively held so to do, that we deem it proper to mention the fact here, i. e., it connotes a huge and perhaps principal benefit to the State, in contributing to the advancement of education, the promotion of literacy, the health and safety of its citizens, that it seems too narrow and insufficient to confine it in such a verbal straight jacket."

That observation made in support of the disbursements nevertheless emphasizes the almost limitless extent of the "child-benefit" theory. We quickly perceive that it applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of knowledge, are the installation and maintenance of cafetèrias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward "the advancement of education, the promotion of literacy and the health and safety" of the pupils. Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools.

On the contrary, the courts of at least six states have held that the private or parochial schools attended by the children are beneficiaries of such legislation and that the legislation violates constitutional provisions which prohibit benefactions of that character. *State ex rel. Traub vs. Brown* (1934), 6 W. W. Harr. 32, 36 Del. 181, 172 Atl. 835 (writ of error dismissed 39 Del. 187, 197 Atl. 478); *Gurney vs. Ferguson* (1941), 190 Okla. 54, 122 Pac. 2d 1002; *Judd vs. Board of Education* (1938), 278 N. Y. 200, 15 N. E. 2d 576; *Mitchell vs. Consolidated School District* (Wash. 1943), 135 Pac. 2d 79; *Williams vs. Board of Trustees* (1917), 173 Ky. 708, 191 S. W. 507, L. R. A. 1917D 453; *Sherrard vs. Jefferson County Board of Education* (1943), 294 Ky. 469, 171 S. W. 2d 963; *Von Straten vs. Milquet* (1923), 180 Wisc. 109, 192 N. W. 392. The following

excerpts will indicate how positively those courts have expressed themselves:

From *Judd vs. Board* (New York Court of Appeals):

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. * * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. * * * The courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (citing cases) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools."

From *State ex rel. Traub vs. Brown* (Delaware Superior Court):

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations. The relators cite in opposition to the above cases, the case of Borden vs. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183. We are not impressed by the reasoning of this case."

From *Gurney vs. Ferguson* (Oklahoma Supreme Court):

> "It is argued that the present legislative act (providing for transportation of pupils attending public schools) does not result in the use of public funds for the benefit or support of this sectarian institution or

school "as such"; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child."

From *Mitchell vs. Consolidated School District* (State of Washington Supreme Court):

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question."

In *Sherrard vs. Jefferson County Board* the Kentucky Court of Appeals dealt with the question of transportation costs, rejected the "child-benefit" theory, approved the reasoning in *Gurney vs. Ferguson, supra,* and gave favorable citation of *State ex rel. Traub vs. Brown* and other decisions mentioned above. The A. L. R. annotator, by way of a resumé of the law held in the cases reported and annotated in 63 A. L. R. 413, 118 A. L. R. 806 and 141 A. L. R. 1152, makes (Vol. 141, p. 1152) this well-supported observation:

"It seems to have been held, in most cases, that the transportation of pupils to a sectarian school amounts to the appropriation of moneys in aid of the school and is therefore unconstitutional."

It is the consensus of the weight of judicial opinion that the "child-benefit" theory, is an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose. I conclude that the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and is in violation of constitutional provisions which prohibit such aid or support. On the assumption

that that is the correct answer to the posed question I proceed to consider our constitutional provisions:

Article 4, sec. 7, para. 6 of our state constitution provides:

> "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense, whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

There can be no doubt that the paragraph was violated if proceeds from the school fund were involved. The majority opinion takes the stand that the record before us is barren of any evidence as to the source of the funds from which the challenged payment was made, and so assumes that the disbursement was from other moneys. I suggest that while there is not specific proof that the payment contained any part of the school fund proceeds, nevertheless there is evidence from which an inference of such a fact may legitimately be drawn and that, such being the case, the thoroughly established jurisdiction of the Supreme Court to find facts, on *certiorari*, which are binding upon us should control here. There was not the slightest suggestion in the proofs that the disbursed money was specially raised, or that it came from a particular source, or that there had been a segregation of the proceeds of the school fund from the other school moneys in the hands of the

township board. It is a fair inference, as I read the testimony, that the school moneys, from whatever source, were mingled and that the litigated disbursements were made from the mingled moneys. Counsel for respondents under the writ, appellants here, brought out by examination of the clerk of the board that the school law provided for payment of transportation costs and that the board, on February 15, 1943, directed the payment of "a transportation bill" for the first half of the school year—the second half-yearly payment was withheld because of this litigation—in the amount of $8,034.95, and that included therein was the transportation of pupils to the Trenton High Schools, both junior and senior, and to the Trenton parochial schools. The machinery by which the proceeds of the state school fund and of the state school tax reaches the several school boards is as follows: The commissioner of education equitably apportions to the several counties the amount appropriated from the state school fund (R. S. 18:10-17) and the state comptroller thereupon draws (italics inserted) "his *warrant* on the state treasurer in favor of the county treasurer of each county for the portion of the income of the state school fund *and* of the state school tax to which the county is entitled" (R. S. 18:10-27) and the respective county treasurer pays the same to the custodian of the school moneys in the several school districts on the orders of the superintendent of schools of the county (R. S. 18:10-28); and the county superintendent is directed to apportion to the several school districts the state school moneys and the interest of the surplus revenue for various named purposes, among which is the meeting of seventy-five per centum of the cost of transportation of pupils (R. S. 18:10-41). I consider that with this statutory mingling of moneys devoted to school purposes and with the proof that the local board directed the payment of "a transportation bill"—the mental picture is of a consolidated figure disposed of as one item—of $8,034.94 for a half year's transportation of both public school and parochial school pupils the Supreme Court had sufficient upon which to support a finding that the amount was paid from mingled moneys, of which the proceeds from the state school fund were a part.

That finding is implicit in the Supreme Court decision. I accept it as supported by the record and therefore as binding upon us. It follows that the designated constitutional provision was violated. But the violation was not of that provision only.

Article 1, para. 19 provides:

> "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

Article 1, para. 20 provides:

> "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

Article 4, sec. 7, para. 11, provides:

> "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * * Providing for the management and support of free public schools."

The conclusion, already reached, that the appropriation is in aid or support of the schools brings both the board resolution and the statute in conflict with para. 20. Our Supreme Court, our Chancery Court and our Court of Errors and Appeals have either expressed or adopted a view that necessarily leads to that result. In *Rutgers College vs. Morgan, Comptroller*, 70 N. J. L. 460, 474, Justice Van Syckel for the Supreme Court said of article 1, para. 20, and of the further provision relating to special laws: "They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; * * *." The opinion, with emendations that did not touch upon that expression, was adopted by the Court of Errors and Ap-

peals, 71 N. J. L. 663. Justice Van Syckel's language was quoted verbatim by Vice Chancellor Buchanan in deciding *In re Voorhees*, 123 N. J. Eq. 142, with this observation (page 146): "This determination was quite clearly approved by the Court of Errors and Appeals in *Morris and Essex Railroad Co.* v. *Mayor, &c., of Newark*, 76 N. J. Law 555, at 560, 70 Atl. Rep. 194". *In re Voorhees* was affirmed *sub Nom. Union County Trust Co. vs. Martin* by the Supreme Court, 121 N. J. L. 594, on the opinion of Vice Chancellor Buchanan and was further affirmed by the Court of Errors and Appeals, 124 N. J. L. 35.

Further, even if acceptance is to be given to appellants' theory that the appropriations are for the benefit of the children, article 1, para. 19 is violated by the resolution under review because that resolution contains no provision for the transportation of children generally. The authorized payment becomes a gift of money in aid of individuals. There is no provision for the transportation of children attending private or sectarian schools other than Catholic schools. Contrary to the statement of Chief Justice Hughes in *Cochran vs. Louisiana State Board, supra*, the resolution *does* segregate the schools and the pupils designated as beneficiaries. As has already been said, either the authority for this and every other provision of the resolution must be read into the statute or there is no authority for the resolution. Again, since the resolution is special as to those who are thus benefited by it and the arrangement is fitted into and integrated with the public school legislation, I consider that the constitutional prohibition against special legislation with respect to that system is violated, at least in spirit.

There is no compulsion upon parents in this state to send their children to a public school; but the public schools are open to every child and are attended by children of all religious faiths. The suggestion that, notwithstanding constitutional restraint, transportation may be furnished, at public expense, to such private or sectarian schools in another municipality as a parent or guardian may select, even though there are public school facilities within the district, is not, I think, supported by the statute. It will be recalled

that some of the children were transported to parochial elementary classes in Trenton although public schools of those grades were maintained in Ewing Township. The statute (R. S. 18:14-8) is not fairly susceptible of the construction that when a district board, owing to the lack of a local high school, arranges for the transportation of public school pupils to *high schools* in other centers, it may thereupon, likewise at public expense, transport children to the *elementary grades* of parochial schools located in those centers.

I hold district boards of education to be within the inhibitions placed by paragraphs 19 and 20, *supra*; upon municipalities and municipal corporations. *Cf. Landis vs. School District*, 57 N. J. L. 509, *State* v. *Deshler*, 25 N. J. L. 177, *Strock vs. East Orange*, 77 N. J. L. 382, *Trustees vs. Civil Service Commission*, 83 N. J. L. 196, 202, aff. 86 N. J. L. 307.

Article 1, para. 3 of our state constitution provides:

> "No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents. They operate at a loss. Inasmuch as the disbursements

from public moneys are, according to the view taken above, in aid or support of the schools thus maintained and operated, and there is no dispute over the proposition that tax moneys are a part thereof, I come to the further conclusion that the resolution is in violation of article 1, para. 3, *supra*.

Both the resolution of the board and the statute upon which the resolution is rested are before us for review. In my opinion both are in violation of our constitution and the resolution exceeds the statutory authority.

For the reasons stated I vote to affirm the judgment below.

A True Copy, J. A. Brophy, Clerk.

(3412)